

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODNEY S. PETILLO,
Petitioner,
v.
BRIAN DUFFY,
Respondent. } NO. CV 15-765-DDP (AGR)
ORDER TO SHOW CAUSE

Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **March 9, 2015**, why the court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

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SUMMARY OF PROCEEDINGS

In 1986 Petitioner plead guilty to second degree murder and was sentenced to 15 years to life. (Petition at 2.)

On September 23, 2010, the Parole Board denied Petitioner parole.
(Petition, Attached Hearing transcript at 1 & Decision at 9.)

On June 18, 2012, Petitioner filed a habeas petition in the California Court of Appeal, which was denied on June 27, 2012. California Appellate Courts Case Information online docket in Case No. B241915. On June 20, 2013, Petitioner filed a habeas petition in the California Supreme Court, which was denied on August 21, 2013. (Petition, Attached.)

On January 27, 2015, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this court. (Petition, back of envelope.) He raises three grounds. (*Id.* at 5-6.)

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STATUTE OF LIMITATIONS

The petition was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

The AEDPA has a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). The limitation period starts running on the latest of either the date when a conviction becomes final under 28 U.S.C. § 2244(d)(1)(A) or a date set in § 2244(d)(1)(B)-(D). The only relevant provision here is subdivision (d)(1)(D).

A. Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)

Section 2244's "one-year limitation period applies to all habeas petitions filed by persons in 'custody pursuant to the judgment of a State court,' 28 U.S.C. § 2244(d)(1), even if the petition challenges a pertinent administrative decision

1 rather than a state court judgment.” *Shelby v. Bartlett*, 391 F.3d 1061, 1063 (9th
2 Cir. 2004); see also *Redd v. McGrath*, 343 F.3d 1077, 1082 (9th Cir. 2003) (the
3 statute starts to run when the Parole Board denies an inmate’s administrative
4 appeal); *Mardesich v. Cate*, 668 F.3d 1164, 1171-72 (9th Cir. 2012) (same).

5 All three grounds in the petition involve challenges to the Parole Board’s
6 decision. (Petition at 5-6.)

7 The Parole Board’s September 23, 2010 decision became final on January
8 21, 2011, 120 days after the hearing and decision. (Petition, Attached Parole
9 Board Decision at 10); see also 15 Cal. Code Regs § 2041(h). Barring tolling, the
10 statute of limitations expired on January 21, 2012.

11 **B. Statutory Tolling**

12 Petitioner is not entitled to statutory tolling because his first habeas petition
13 was not filed until June 18, 2012 in the California Court of Appeal (California
14 Appellate Courts Case Information online docket in Case No. B241915), after the
15 statute of limitations had expired. See *Ferguson v. Palmateer*, 321 F.3d 820, 823
16 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations
17 period that has ended before the state petition was filed”).

18 **C. Equitable Tolling**

19 “[T]he timeliness provision in the federal habeas corpus statute is subject to
20 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
21 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he
22 has been pursuing his rights diligently, and (2) that some extraordinary
23 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting
24 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
25 (2005)). “The diligence required for equitable tolling purposes is “reasonable
26 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation
27 marks omitted). The extraordinary circumstances must have been the cause of
28 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this

1 reason only when “extraordinary circumstances beyond a prisoner’s control
2 make it *impossible* to file a petition on time” and “the extraordinary
3 circumstances” were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*,
4 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in original).

5 There is no indication in the petition that Petitioner is entitled to equitable
6 tolling.

7 **III.**

8 **RECOMMENDATION**

9 IT IS THEREFORE ORDERED that, on or before **March 9, 2015**, Petitioner
10 shall show cause why the court should not recommend dismissal with prejudice
11 of the petition based on expiration of the one-year statute of limitations.

12 **Petitioner is advised that if he fails to respond to this order to show
13 cause by March 9, 2015, the court will recommend that the petition be
14 dismissed with prejudice based on expiration of the one-year statute of
15 limitations.**

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17 DATED: February 9, 2015


Alicia G. Rosenberg

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ALICIA G. ROSENBERG
United States Magistrate Judge

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